BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Relating to Commission's Jurisdiction Over Interstate Fax Communications	)	DA 05-2975

TO: The Commission

NATIONAL ASSOCIATION OF REALTORS®
COMMENTS ON FAX BAN COALITION
PETITION FOR DECLARATORY RULING

The NATIONAL ASSOCIATION OF REALTORS® ("NAR") urges the Commission to grant the Petition for Declaratory Ruling filed on November 7, 2005 by the Fax Ban Coalition ("the Coalition").[1] As the Petition indicated, in order to ensure a uniform and workable scheme for controlling commercial facsimiles ("faxes"), Congress provided the Commission with exclusive jurisdiction to regulate interstate commercial faxes. This grant of jurisdiction is consistent with the Commission's general authority under the Communications Act to regulate interstate communications. Uniform treatment of interstate faxes is required by the Telephone Consumer Protection Act of 1991 and the Junk Fax Prevention Act of 2005, which created a national scheme for balancing the interests of consumers, customers and businesses concerning unsolicited

[1] *See* Fax Ban Coalition, Petition for Declaratory Ruling (filed Nov. 7, 2005) ("Petition").

faxed advertisements. Uniform national treatment of interstate faxes is important to the 1.2 million real estate professionals represented by NAR, since the current patchwork of laws makes it nearly impossible for real estate professionals to comply. Because some States have sought to reach fax activity that occurs beyond their borders, and therefore have invaded the interstate realm occupied by the Commission, we urge the FCC to declare any State laws purporting to regulate interstate faxes preempted by federal law.

BACKGROUND

NAR represents more than 1.2 million real estate practitioners. The world's largest professional trade association, NAR is composed of real estate professionals who are involved at the local level in residential and commercial real estate nationwide as brokers, salespeople, property managers, appraisers, counselors, investors, developers and others engaged in all aspects of the real estate industry. The real estate industry employs over three and a half million people and represents a vital segment of our economy that drives numerous other industries, including the financial, construction, furniture, and appliance sectors. Particularly now, real estate is one of this country's leading areas of economic growth and stability, and it is therefore vital to the United States economy. As a result, the impossibility of complying with the patchwork of inconsistent State fax laws will likely impose substantial and unnecessary costs on the real estate industry, the nation's economy at large, and on consumers.

DISCUSSION

In its Petition, the Fax Ban Coalition correctly asserts that Congress, in enacting the Communications Act of 1934, the Telephone Consumer Protection Act of

1991 ("TCPA"),[2] and the Junk Fax Prevention Act of 2005 ("JFPA"),[3] intended to establish a uniform federal scheme for the regulation of interstate commercial faxes. NAR supports the Coalition's request because a declaratory ruling is needed to achieve Congress's goal of creating an effective and workable scheme for controlling unsolicited commercial faxes, while protecting the ability of real estate professionals and others to continue to conduct their legitimate business activities.

I. FAX COMMUNICATION IS CRITICAL TO THE REAL ESTATE INDUSTRY.

As anyone who has bought or sold real property knows, fax communication is essential to the real estate trade. For example, real estate brokers and agents regularly send faxes to potential clients who have made an inquiry about their services with regard to either buying or selling property. Real estate professionals also routinely send faxes to each other to provide information about newly listed properties. Because of the nature of the real estate industry, these contacts are often highly informal and represent an important way for agents to meet new clients. To maintain the vitality of the industry, real estate professionals need to be able to quickly follow up on these consumer inquiries with a fax message containing information relevant to an inquiry from a real estate professional or a consumer. Real estate professionals also often send faxes to recent clients to alert them to particular property which, based on past experience, may be of interest. The use of fax messages thus represent a vital tool for real estate professionals to efficiently distribute information and keep in touch with each other and with current and recent clients.

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[2] 47 U.S.C. § 227.

[3] Pub. L. No. 109-21, 119 Stat. 359 (2005).

Many of the fax messages sent by real estate professionals cross State lines. It is true that a number of real estate professionals trade only in local property – but that does little to minimize the volume of interstate calls and faxes they generate. For example, many "localities" – including a significant number of this country's major metropolitan areas –spread over multiple States. Thus, real estate professionals based in the District of Columbia regularly send faxes not only within the District, but also to Maryland, Virginia, and West Virginia; real estate agents in the New York City region routinely fax New York, Connecticut, and New Jersey; real estate brokers in Memphis fax not only within Tennessee, but also Mississippi and Arkansas; and on and on. Interstate faxes therefore are an integral part of the daily life of even the most locally focused real estate professional.

In addition, because an individual must buy, sell, or rent real property virtually any time he or she moves, real estate professionals frequently send faxes well beyond their local area. For instance, an individual moving from Wisconsin to Massachusetts will likely need to buy or rent a home in the latter before he moves – but may not be able to visit before doing so. If the Wisconsin resident makes an informal inquiry about property to a real estate professional in Massachusetts, that professional needs to promptly provide him with information responsive to his inquiry. And this type of interstate telephone communication happens thousands of times every day between real estate agents and their potential, current, and recent clients.

In some areas of the United States, interstate faxes are particularly critical to the businesses of real estate professionals. For instance, real estate agents who sell or rent vacation property – from beach homes to mountain cabins – routinely send fax messages to potential, current, and recent clients who live in other States around the country. For all these reasons, the efficient use of interstate faxes as a business tool is vital to the continued success of the industry.

II. APPLICABLE LAW REQUIRES THAT THE COMMISSION EXERCISE EXCLUSIVE JURISDICTION OVER INTERSTATE COMMERCIAL FAXES.

In the unique area of telecommunications, Congress drew and has maintained a bright line between interstate and intrastate activities. For more than 70 years, the Commission has had exclusive regulatory jurisdiction over *inter*state communications, and States have had jurisdiction over *intra*state communications. Neither the TCPA nor the JFPA, both of which amend the Communications Act, altered this longstanding dual regulatory scheme.

A. The Relevant Statutes Support Exclusive Commission Jurisdiction over Interstate Calls.

Section 227(e)(1) of the TCPA provides that "nothing in this section [] shall preempt any State law that imposes more restrictive *intra*state requirements or regulations on, or which prohibits" commercial fax messages.[4] This provision – like the language of the TCPA in general – is silent as to interstate calls. In the Report and Order, the Commission stated that section 227(e)(1) is "ambiguous" with respect to interstate faxes.[5] That conclusion is wrong. The fact that a clause in a statute is silent on a particular point does not mean that the statute is ambiguous.[6] A statutory provision must be interpreted in the context of the larger statutory scheme, and here, the entire

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4 47 U.S.C. § 227(e)(1) (emphasis added).

5 Report and Order ¶ 82.

6 *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *Garrett v. United States*, 471 U.S. 773, 793 (1985).

Communication Act speaks loudly in favor of exclusive federal jurisdiction over interstate faxes.

The Communications Act of 1934 granted the Commission jurisdiction over "all interstate and foreign communication" but reserved to the States jurisdiction with respect to "intrastate communication service."[7] More than 50 years later, the Supreme Court acknowledged the schism in telephone regulation that Congress had imposed "to divide the world into two hemispheres – one comprised of interstate service, over which the FCC would have plenary authority, and the other made of up intrastate service, over which the states would retain exclusive jurisdiction."[8]

This fundamental division had been in place for decades by the time the TCPA was written and enacted in 1991 as an amendment to the Communications Act. Indeed, the legislative history of the TCPA indicates that Congress did not even contemplate that States had *any* authority to regulate interstate telemarketing calls. The Senate Committee Report states: "*Federal action is necessary because States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls.*"[9] Senator Hollings stated unequivocally during consideration of the Act that "State law does not, and cannot, regulate interstate calls."[10] And the Congressional findings accompanying the TCPA were premised in part on the conclusion that States simply had no authority over interstate calls: "Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their

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7 47 U.S.C. § 152(a), (b).

8 *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

9 S. Rep. No. 102-178, at 5 (1991).

10 137 Cong. Rec. S16204-01, S16205 (1991) (remarks of Sen. Hollings).

prohibitions through interstate operations."[11] Had the States had any power with respect to interstate calls, of course, that Congressional finding would make no sense.

So while the TCPA is arguably silent with respect to the preemption of State laws governing interstate calls, it is wrong that the TCPA and the Communications Act of which it was made a part are ambiguous on that question. There was no point in stating in a 1991 amendment to the Communications Act that State laws affecting interstate telecommunications were preempted, because States had no authority in this area and therefore there was nothing to preempt. For more than 50 years before the passage of the TCPA, it had been well-settled that the Communications Act preempted State regulation of interstate telecommunications, and that position had been strongly endorsed by the Supreme Court just a few years before. The TCPA therefore was written against this backdrop that States had no role to regulate interstate communications. The inclusion of language preempting State laws governing interstate faxes would thus have been "mere surplusage" – and it is well-established that Congress is presumed not to have included any such language that is unnecessary or redundant.[12]

B. The Commission's Own Jurisprudence Supports Exclusive Regulatory Jurisdiction Over Interstate Faxes.

Congress is not the only entity to have understood and repeatedly reiterated that States have no jurisdiction to regulate interstate faxes. In fact – as the Fax Ban Coalition Petition explains– the Commission itself has so concluded on many

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11 H.R. Rep. 102-317, at 2 (1991).

12 *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994).

occasions.[13] These statements of exclusive regulatory jurisdiction have been consistent and unequivocal:

- in 1975: "The States do not have jurisdiction over interstate communications."
- in 1991: "The Commission's jurisdiction over interstate and foreign communications is exclusive of state authority."
- in 2005: "In the absence of a specific statutory provision regarding jurisdiction . . . Congress has given the Commission exclusive jurisdiction over 'all interstate and foreign communication' and 'all persons engaged . . . in such communication.'"[14]

Parts of the 2003 Report and Order acknowledges this reality. Citing the seminal preemption case of *Louisiana Public Service Commission*, the Report and Order "recognizes that states traditionally have had jurisdiction over intrastate calls, while the Commission has had jurisdiction over interstate calls."[15] The Commission even accepted that Congress drafted the TCPA "based upon the concern that states lack jurisdiction over interstate calls" and referred to key elements of the Act's legislative history in support of this point.[16]

The Commission, unfortunately, however, stopped short of asserting exclusive jurisdiction with respect to interstate activity.[17] The substance of the

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13 Joint Petition at 33-34.

14 56 FCC 2d 14 at ¶ 21 (1975); 6 FCC Rcd. 4475 at ¶ 10 (1991); 19 FCC Rcd. 22,404 at ¶ 16 (2005).

15 Report and Order ¶ 83.

16 *Id.* (citing S. Rep. 102-178, at 3).

17 *See* Notice of Proposed Rulemaking and Memorandum Opinion and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 ¶ 48 (rel. Sept. 18, 2002) ("The Commission seeks comment on whether and, if so, to what degree, state requirements should be preempted. Some courts have held that the TCPA does not necessarily preempt less restrictive state

Commission's findings, though, was plain: "[I]t was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. . . . We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted."[18]

Now is the time for the Commission to take the next, necessary step. As the Petition demonstrates in alarming detail, many States have failed to heed the Commission's admonition and have sought to regulate interstate faxes.[19] The issue of exclusive jurisdiction with respect to interstate faxes is now squarely before the Commission along with the issue of interstate telemarketing, and the Commission should assert such jurisdiction. Doing so reflects the clear congressional allocation of jurisdictional responsibility and stands consistent with decades of Commission precedent.

III. THE EXISTING FEDERAL SCHEME IS THE MOST EFFECTIVE WAY TO REGULATE INTERSTATE COMMERCIAL FAXES.

As Congress concluded when it gave the FCC exclusive jurisdiction over interstate commercial faxes, exclusive jurisdiction is critical to the success of any scheme regulating such messages. No regulatory regime that requires businesses to comply with fifty inconsistent State laws governing commercial faxes can be successful, and the current patchwork of State laws governing such faxes creates needless confusion,

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laws on telemarketing. We seek comment on this interpretation. In addition, we ask whether preemption should depend on whether the state law in question applies solely to intrastate telemarketing or to interstate telemarketing as well. What conflicts between state telemarketing laws and federal law might warrant preemption?").

18 Report and Order ¶ 83-84.

19 Joint Petition at 9-32.

imposes undue burdens and risks on real estate professionals trying to comply, and only leads to consumer confusion.

The TCPA and the JFPA made clear that commercial faxing is a national issue that affects residents throughout the United States. As the Commission recognized in the Report and Order, "inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs and potential consumer confusion."[20] The purpose of the TCPA is "to protect the privacy interests of residential telephone subscribers," and the Commission's rules establish a comprehensive regime that does just that.[21]

Although each State should be able to dictate the requirements for intrastate fax messages transmitted by a sender in that state to a recipient in that State – under the traditional dual regulatory regime in the area of communications and because such calls do not directly impact interstate commerce – there is no reason why that State should be able to subject entities operating beyond its borders to those same rules. Unlike in areas such as real estate licensing – where a real estate professional from one State actually transacts business in another state and should therefore be required to adhere to the latter State's substantive licensing laws – commercial fax and telemarketing laws implicate national communications laws. And for seven decades the federal government has been uniquely positioned to – and in fact thoroughly does – regulate the type of interstate communications that arise in the context of telephone-based marketing.

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20 *Id.* ¶ 83.

21 S. Rep. 102-178, at 1.

The existing patchwork of State regulation has become untenable for both businesses and consumers. In general, any company that sends interstate faxes – including countless real estate professionals – has two choices: (1) take measures to compartmentalize its faxed messages on a State-by-State basis; or (2) rely on the Commission's statement in the Report and Order that conflicting State laws governing interstate faxed messages "almost certainly would be preempted" and worry about complying only with the federal unsolicited fax rules.[22] Neither of these options, however, is defensible.

The first option – attempting to comply with unsolicited fax requirements on a State-by-State basis – is completely unworkable because interstate faxes are often sent on an automated basis, using established forms which speed the distribution of real estate information. In contrast with intrastate faxes – where the caller knows that it is subject to one set of state rules that it can therefore devote the necessary time and effort to understand and follow – the volume and diversity of interstate faxes and the State laws that purport to govern them make compliance highly difficult. Even the most sophisticated company that sought to comply with the multitude of State fax laws would need lawyers to untangle the web of conflicting and often ambiguous State statutes governing commercial faxes, and then somehow translate those requirements into State-by-State guidelines accessible to every employee who ever sends a commercial fax (the definition of which varies from State to State). Determining how, when, where, and even whether to send a commercial fax would be an expensive proposition for every U.S. company, but especially burdensome for small businesses such as real estate

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22 Report and Order ¶ 84.

professionals, most of whom work in small or mid-sized entities and simply cannot afford the time and money to develop a fax compliance flowchart that keeps current with nearly 50 sets of divergent laws.

The second approach – complying with the federal rules but ignoring State laws with respect to interstate commercial faxes in reliance on the Commission's statement that such laws would likely be preempted – is equally objectionable. The case-by-case approach that the Commission proposed in the Report and Order may have showed deference to the States, but the States have not reciprocated. As the Fax Ban Coalition's Petition shows, States are aggressively taking action against companies sending interstate faxes *in compliance with the federal rules* but in contravention of obscure State requirements – actions that flout the letter and violate the spirit of the Report and Order. Under this approach, the Massachusetts real estate agent could fax the Wisconsin resident – but she risks State enforcement action by doing so.

Importantly, an approach which would otherwise be available – identifying the strictest of the State commercial fax laws and adopting it as the definitive standard – is unavailable because of the significant differences between the State fax laws. As shown in the Fax Ban Coalition petition, the various State fax laws prescribe specific items which must be included in faxes, identify the placement and type size for those statements, specify the maximum length of commercial faxes, and even limit – in wholly inconsistent ways – the times during which commercial faxes may be sent.[23] If given effect, this hodgepodge of State regulation simply renders the federal fax rules ineffective. More importantly, it turns each and every real estate professional attempting

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[23] *See generally* Petition at 19-20 and Apx. C.

to identify and follow the strictest State law into an unwitting lawbreaker when sending faxes to States whose rules are inconsistent. Under this "highest common denominator" standard, a real estate professional would likely be forbidden in practice to respond by fax to an inquiry from any potential client residing in another State.

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For the reasons stated herein, the NATIONAL ASSOCIATION OF REALTORS® asks the Commission to grant the Fax Ban Coalition's request for a declaratory ruling that the FCC has exclusive regulatory jurisdiction over interstate commercial faxes.

Respectfully submitted,

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